IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 155 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAMADHAR PURMALE KUSWAH

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 155 of 2000
MRS SHILPA J UNWALLA for Appellant No.
THROUGH JAIL for Appellant No.
Ms.Hansa Punani, learned A.P.P. for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR.JUSTICE SHARAD D.DAVE

Date of decision: 31/08/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE SHARAD D.DAVE)

#. This appeal has been preferred by the accused against the judgment and order passed by the learned Additional Sessions Judge, Court No.8, Ahmedabad City in Sessions Case no. 80 of 1999 on 18.01.2000 convicting him under Sections 18,20(b)(2), 22 of the N.D.P.S.Act and Section 66(b) of Prohibition Act and sentencing to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.1,00,000/-, in default to suffer further rigorous imprisonment for one year.

#. The short facts of the case are that Senior Police Inspector, Vatva Police Station on 26.12.98 has filed complaint with contentions that on 26.12.98 at about 11.30 a.m., he got information from Police Constable Dilipsinh Mangalsinh by written report that in noon between 13.00 to 14.00 hours, one person who had put on grey colour full sleeve sweater and light grey colour pant and who is of single body, has to pass with suit case in his hand through Ghodasar underground way and he is carrying charas in the said suit case with him. The said information was noted down in police station diary at Entry no.12/98 and called two panchas. On the panchas agreeing to act as panchas, the preliminary panchanama was drawn to that effect in the police station itself and informed the superior officer on phone and in writing. After that, they all went to Vatva-Isanpur road in vehicle and from there went to Narol-Naroda highway at Ghodasar underground road. At about 13.35, a person of above description came from Cadila bridge side with suit case in his right hand. On inquiry, he gave his name as Ramadhar Parmule Kuswah residing in Santosh Society, Rambhai Rabari's house, Opposite Gebansha Dargah, Isanpur Road, Ahmedabad. He was informed about his right of search and seizure in presence of Gazetted Officer/Magistrate and on his replying in the negative, he was searched by complainant in presence of panchas, police persons etc. Nothing was found from his person but from the suit case which he was carrying, beneath the clothes, red colour and green colour plastic bags were found from which black and semi-black coloured substance was found. Thereafter, expert from FSL and a person for weighing the substance was called. On their coming, the substance was found as charas each weighing 240 gms. and 248 gms. respectively. The samples from each substance were taken and was sealed and attached under the panchanama. Thereafter, P.I.Shri N.B.Parmar prepared the complaint, on behalf of the Government, to that effect

and signed the same. Thereafter, he sent the complaint along with muddammal, panchanama, accused and report to the P.S.O., Vatva Police Station for the purpose of registering the offence and on receiving the same, he registered the same and further investigation was handed over to P.I.Mr.Barot and at the end of investigation, charge sheet was submitted which was numbered as Sessions Case No. 80 of 1999 and charge was framed against the accused. As the accused pleaded not guilty and prayed for trial, the prosecution examined oral witnesses, i.e. (1) Hasmukhbhai Manilal Bhagat at Exh.7, (2) Kishanbhai Laxmanbhai Rajput at Exh.11, (3) Dilipsinh Mangalsinh at Exh.13, (4) Roopjibhai Kachraji at Exh.16, (5) Mafaji Kaluji at Exh.23, (6) Hitendrasinh Khodubha at Exh.25, (7) Narayansinh Bhavansinh Parmar at Exh.28 and (8) Rameshbhai Muljibhai at Exh.37 and also placed reliance on the documentary evidence with list Exh.6 consisting of complaint at Exh.31, Panchnama at Exh.13, arrest report at Exh.32, seizure memo at Exh.33, report to Police Commissioner at Exh.34, FSL report at Exh.38 etc. On completion of the same, further statements of the accused under Section 313 of the Criminal Procedure Code were recorded and after hearing the learned counsel for the respective parties, the judgment and order referred to above was passed.

#. We have heard the learned counsel for the parties. Learned counsel Ms.Shilpa Unwala who appeared on behalf of the accused has argued that when the complainant received secret information, same was not reduced in writing by him and has also not informed regarding the same to his superior officer. It is also submitted that before the search and seizure, accused was not informed by the P.S.I.regarding his valuable right to be search and seizure before the Magistrate/Gazetted Officer and therefore has failed to comply with the provisions of Sections 42 and 50 of the N.D.P.S.Act. Therefore, she prayed for allowing the appeal and acquitting the accused. Learned A.P.P. for the state submitted that the prosecution has proved beyond reasonable doubt that the muddammal in question has been seized from the accused and also proved that same has been found as contraband article charas and there are no material contradictions and therefore the court below has rightly convicted the accused and therefore the said judgment does not require interference.

#. As far as first contention is concerned, it has been reflected from the complaint, panchanama and station diary entry no.12 of 1998 and other documentary evidence as well as from the oral evidence of the complainant

P.I.Shri Parmar and panchas and other persons who were present in the raid including weighing person etc. it has been established beyond reasonable doubt that on receiving the secret information from Constable Dilipsinh informed the same to his superior officer i.e. complainant and in turn it has been reduced in writing by superior officer which reflects from station diary entry no.12 of 1998. It also reflects from the evidence on record that they have also informed superior officer regarding the same. It is also established by oral as well as documentary evidence that before the search and seizure of the accused, the accused was informed by the authority regarding his valuable right to be search and seizure before the Magistrate / Gazetted Officer. So, in short, before search and seizure, required procedure has been strictly followed by the prosecution and the witness upon which the prosecution has placed reliance has been minutely cross examined by the learned advocate for the accused but nothing has come out to the rescue of the accused. The same has been discussed by the court below in para 19, page 15 of the judgment. While doing so, he has dealt with the oral evidence of various witnesses, i.e. panch witness Hasmukhbhai Manilal Bhagat, Constable Dilipsinh who has received secret information through his agent, Kishanbhai Laxmanbhai Rajput who weighed muddamal on the spot and also the evidence of PI Shri Parmar (complainant), regarding muddamal which was received by PSO and which has remained in custody of the Crime Writer Head till it was sent to the FSL for analysis and returned back to the Police Station. To that effect they have also examined Roopjibhai Kachraji, PSO Vatva Police Station, Mafaji Kaluji, Crime Writer Head, Hitendrasinh Khodubha, the person who has taken the muddamal from the Crime Writer Head for the purpose of handing over the same to the FSL. After discussing the above referred evidence of the witnesses in detail, the court has come to the conclusion that while doing search and seizure all required procedure has been followed by the prosecution though he has primarily come to the conclusion that there was personal search of the accused, but it was search of the suit case which he was carrying. Therefore, the court below has come to the conclusion that the question of following Section 50 of the NDPS Act does not arise and for that discussed the decision reported in (1999) 8 SCC 259 wherein it is observed on page 260 as under.:

> ".....If a person is carrying a bag or some other article with him and a narcotic drug or a psychotropic substance is found from it, it cannot be said that it was found from his "person". In this case, heroin was found from a

bag belonging to the appellant and not from his person and therefore it was not necessary to make an offer for search in the presence of a Gazetted Officer or a Magistrate."

So, in short as per the conclusion arrived at by the court below in para 20 that though section 50 of the NDPS Act is not required to be followed, then also while doing the search and seizure, the prosecution has strictly followed the procedure under Sections 42 and 50 both. Though it has not been argued, for the purpose of our satisfaction, we have gone through the evidence on record which have been shown to us by the learned counsel for the respective parties which clearly establish that the muddamal in question which has been seized from the custody of the accused was seized by the authority, sent for FSL for analysis and till then it remained intact.

#. In view of the above facts and circumstances, this appeal requires to be dismissed and accordingly it is dismissed.

(R.P.DHOLAKIA, J)

(SHARAD D DAVE, J)

srilatha